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No. 82-2032

In the Supreme Court of the United States

October Term, 1982

GABRIEL C. NEDECZKY,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEALS GREENE COUNTY, OHIO

REPLY BRIEF OF PETITIONER

WILLIAM D. BEYER
Counsel of Record
840 Western Reserve Building
1468 West Ninth Street
Cleveland, Ohio 44113
(216) 781-7777
Attorney for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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To The Honorable Chief Justice And Associate Justices of the Supreme Court of the United States:

Petitioner, Gabriel C. Nedeczky, respectfully submits the instant Reply Brief Of Petitioner and respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for Greene County, Ohio, which judgment became final on April 13, 1983, when the Supreme Court of Ohio dismissed petitioner's Memorandum In Support Of Jurisdiction and denied further appellate review.

STATEMENT OF THE FACTS

On page 7 of its Brief For The State Of Ohio In Opposition, Respondent alleges that petitioner had been staying at the searched premises for four or five days prior to the search. In support of this contention, respondent cites to the testimony of petitioner at the suppression hearing. It is clear from an examination of the affidavit, search warrant and transcript of the suppression hearing that neither the issuing magistrate nor the executing officers at the time of the search was aware of the length of petitioner's visit.

Indeed, the only connection between petitioner and the searched premises was that petitioner's car had been parked near the house on the night before the search. However, it was not until *after* the search of petitioner's briefcase had been completed that the officers became aware that said car belonged to petitioner (Tr. 22-23).

REASONS FOR GRANTING WRIT

I. THE INSTANT PETITION PRESENTS A FINAL APPEALABLE ORDER WHICH IS RIPE FOR ADJUDICATION.

Respondent, in the first of its Reasons For Denying Writ, engages in a novel bit of sophistry, which seems to highlight its recognition of the weakness of its argument on the merits.

Respondent notes that petitioner would have had no right to an immediate appeal had the *trial court* overruled his Motion To Suppress. Thus, respondent argues that, since the ruling of the Court of Appeals accomplishes the

same result (i.e., non-suppression), petitioner has no right to prosecute the instant appellate action. Respondent contends that petitioner's right to pursue the instant relief cannot arise until and unless petitioner is subsequently convicted.

Respondent's argument is misleading and should be rejected for several reasons. First the Court of Appeals ruled upon all issues presented to it. Nothing remained for the appellate court to resolve. Its judgment, thus, constitutes a final, appealable order.

> A judgment of a reviewing court, the Ohio Supreme Court has declared, is complete, final and further appealable, when its action and instructions to the trial court are definitely stated, the reason therefor is clearly recited, no required action is omitted, and the cause is remanded to the trial court for retrial.

4 OHIO JUR. 2d 253, *Appellate Review,* §109. *See also, Lesh v. Lesh,* 138 Ohio St. 492 (1941).

The United States Supreme Court has recognized a similar standard in *Gospel Army v. Los Angeles,* 331 U.S. 543, at 547 (1947), where it noted that a judgment would be considered final and appealable where "the record shows that the order of the appellate court has in fact fully adjudicated rights and that *that* adjudication is not subject to further review by a state court . . ." (Emphasis added).

The second reason why respondent's argument should be rejected is that the instant ruling was not made by the trial court, but rather by the Ohio Court of Appeals. Pursuant to Section 2945.67 of the Ohio Revised Code and Rule 12(J) of the Ohio Rules of Criminal Procedure, respondent was permitted to appeal the trial court's order

suppressing physical evidence. Such legislative directives clearly treat a trial court's order to suppress evidence as final and appealable. It is, thus, illogical to treat such orders as final for purposes of appeal within the Ohio judicial system and otherwise for purposes of appellate review by this Court.

Third, such illogic is dramatically illustrated by an examination of the direct result of respondent's reasoning—i.e., that petitioner would *forever* be barred from presenting the instant issue for Supreme Court review. If this case were now remanded and petitioner were acquitted, the instant constitutional issue would become moot. If, on the other hand, petitioner were convicted based on the physical evidence he had sought to suppress, he would be unable, at that time, to appeal the trial court's judgment to the Ohio Court of Appeals—principles of *res judicata* would preclude such appeal, since the suppression issue has already been decided. Accordingly, it would be impossible for petitioner to ever present this Constitutional issue for Supreme Court review.

This Court has recognized that such a judgment, which does not dispose of or adjudicate the entire case or controversy, might still be treated as final and subject to Supreme Court review:

> In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, governing state law would not permit him

> again to present his federal claim for review. This Court has taken jurisdiction in these circumstances prior to completion of the case in the state courts.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 481 (1974). *See also, North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973); *California v. Stewart*, decided *sub nom. Miranda v. Arizona*, 384 U.S. 436 (1966).

In the instant matter, further state review of the Fourth Amendment suppression issue will be precluded, regardless of how the trial court decides this case on the merits. If petitioner is acquitted, the issue will be moot; if he is convicted, state appellate review will be precluded on the basis of *res judicata*. Accordingly, unless this Court asserts its jurisdiction herein, the erroneous decision of the Ohio Court of Appeals will stand until and unless challenged in a subsequent case after conviction.[1]

Moreover, as demonstrated in the Petition For A Writ Of Certiorari, such decision of the Ohio Court of Appeals stands in direct conflict with that of the State of Pennsylvania. Furthermore, much confusion exists among lower federal courts with respect to the issue herein presented. Therefore, this Court should assert its jurisdiction in this matter, rather than leave this significant constitutional question unanswered. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1973).

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1. Under this Court's doctrine of *Stone v. Powell*, 428 U.S. 465 (1976), relief by way of habeas corpus may not be available to petitioner regardless of the ultimate decision of the trial court in this case.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE STATE COURT DECISION ALLOWS FOR SEARCHES ABSENT PROBABLE CAUSE.

Respondent, in the second of its Reasons For Denying Writ, puts forth a number of arguments, none of which is compelling. Respondent's first argument—that the principles of *United States v. Ross,* 102 S. Ct. 2157 (1982) legitimize the subject search—has been adequately discussed in the Petition, and will not be further controverted herein.

Respondent's second argument is, essentially, that Hotop was known to have engaged in drug transactions earlier in the week of the subject search and that petitioner's car was present at or near the premises during one of these transactions. Because of these "facts," respondent concludes that the scope of the warrant may be deemed to have encompassed petitioner. Respondent's argument is seriously flawed.

First, it is clear that neither the search warrant nor the affidavit in support thereof made any reference to petitioner—either express or implied—and cannot be construed as a finding of probable cause relative to petitioner. Second, although respondent argues that petitioner had been present at Hotop's residence for four or five days prior to the search, it is clear that the executing officers were not aware of the duration of such visit *until petitioner testified at the suppression hearing.* Third, the officers executing the subject warrant were not aware *until after the search had been completed* that petitioner even owned a car, much less one that was present earlier in the week (Tr. 22-23). Thus, at the time of the search, the executing officers knew only that petitioner was present on the premises. No information, *subsequently*

discovered, can serve to render such a search constitutionally valid, since probable cause is to be determined as of the time of a search. *Johnson v. United States,* 333 U.S. 10 (1948); *United States v. Di Re,* 332 U.S. 581 (1948).

Respondent's third argument, as stated on page 13 of its Brief, is that

> . . . if Respondent were to be required to obtain an additional search warrant in this case, the affidavit would be substantially the same with the addition of allegations as to the Petitioner's briefcase.

Respondent thus implies that such a requirement would be redundant and purposeless. Nothing could be further from the truth. Such an affidavit would have to state more than just the fact that a briefcase was present on the premises during the search. It would be required to state that such briefcase belonged to a visitor and to state grounds establishing probable cause as to the visitor's property.[2] To allow a search of a visitor's belongings without such an affidavit would be to sanction the transfer of a probable cause finding from one person to another. Thus, the requirement of an additional affidavit and warrant is anything but redundant. Such a requirement would permit a neutral and detached magistrate to make a judicial finding of probable cause as to an item which could not

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2. Respondent's position is that, where executing officers encounter a container known to belong to a third party visitor, a search warrant for such container should not be required, since a warrant would automatically be granted upon submission of the original affidavit along with an addendum stating they had also located a visitor's belongings. Surely, such position is untenable. Would a warrant automatically issue to search the tool box of a television repairman who happened to be present on the premises during the time of a search? Or to search the medical bag of a physician who was treating someone in the house during the execution of the warrant?

have been expected to have been found on the searched premises.

Respondent's final argument is that petitioner's interpretation of the law would force law enforcement officers to rely upon the word of a person on the premises as to the ownership of containers. Such argument represents a severe distortion of petitioner's position and of the established facts of this case. Clearly, it is uncontroverted that the executing officers, in fact, believed it to be petitioner's property.[3]

Obviously, it is possible for the owner of a searched residence to falsely claim that a briefcase containing incriminating evidence is the property of a visitor to the premises. The instant petition does not suggest that executing officers must, in all instances, believe such representations and thereby forego their search of such a briefcase. Clearly, such a requirement would have the ultimate effect of preventing a search whenever a criminal suspect

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3. Indeed, the executing officers had every reason to believe that the briefcase belonged to petitioner, rather than to Hotop, the owner of the premises. There existed no reason to doubt Hotop's statement that the briefcase belonged to petitioner. Hotop had already voluntarily directed the police to substantial evidence incriminating himself. Thus, when Hotop informed the police that the briefcase belonged to petitioner, he had no reason to be untruthful. Moreover, William Modesitt—the officer who conducted the search of petitioner's briefcase—testified as follows at the suppression hearing:

> Q: Just to make clear for the record, Mr. Modesitt, you knew prior to breaking open this case that it belonged to the defendant here, it was not Mr. Hotop's? There was no doubt in your mind at this point?
>
> A: That's correct.

Tr. 34.

Finally, the fact that the executing officers felt it necessary to seek petitioner's permission to open the briefcase is compelling proof that they knew it to be his property (Tr. 5, 15, 31, 32).

arranges to have a "visitor" on the premises who will claim title to such a container. Of course, if one can anticipate a search and arrange to have a visitor present at the time of its execution, he could just as easily avoid the confiscation of his property by secreting it elsewhere.

In any event, the facts of the instant case are clear that the executing officers held no such good faith doubt that the subject briefcase belonged to petitioner. Accordingly, it is unnecessary in the instant proceeding to consider this issue.

Therefore, for the foregoing reasons, this Court should reject the arguments set forth in Respondent's Reasons For Denying Writ and should assert its jurisdiction to resolve this matter.

Respectfully submitted,

WILLIAM D. BEYER
Counsel of Record
840 Western Reserve Building
1468 West Ninth Street
Cleveland, Ohio 44113
(216) 781-7777
Attorney for Petitioner